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THE EQUITY RULE AGAINST FORFEITURE OF A LEASE FOR BREACH OF CONDITION AS APPLIED TO MINES AND MINING LANDS.

—In the development of the oil and gas lands of the United States controversies between lessor and lessee have been very numerous, and often, in order to do justice to the lessor, it becomes necessary for the lessee to forfeit the lease. Due to this fact, the chancery courts found themselves confronted with a very difficult problem whenever suit was brought either to declare the lease terminated and to cancel the deed, or to quiet the title of the lessor.

It can hardly be said that there is any principle in the law more firmly established than that equity never lends its aid to enforce a penalty or forfeiture, or anything in the nature of either. This rule is laid down very strongly by Chancellor Kent in *Livingston* v. *Tompkins*,[1] and the rule is also stated without qualification in *Marshall* v. *Vicksburg*.[2] The general doctrine was

[1] 4 Johns. Ch. 415, 8 Am. Dec. 604.
[2] 15 Wall. 146.

and still is that equity may lend its aid to relieve against a forfeiture or penalty but never will inforce either.[3]

But the reasons for the doctrine that equity abhors a forfeiture are that forfeitures are generally harsh and that other compensation can usually be made to the one who would benefit by the forfeiture so that he will not suffer any loss. For these reasons equity often relieves against a forfeiture.[4] But often, in the case of oil and gas lands, the lessor, because of the inherent nature of the so-called mineral, cannot be properly compensated. These substances flow beneath the surface of the earth in subterranean passages, and a person, who one day is a potential millionaire due to their presence under his estate, may awake the next to find himself only the possessor of a worthless tract of waste land, all his wealth having been pumped from under his soil through the well of his neighbor. When the lessee fails to develop the land and simply stands by and holds it for speculation, the lessor, because of this property of these minerals, looses all of his royalties, and the property to which he has a lawful right goes to enrich some one else. In such a case it would be extremely difficult to estimate the damages which he has suffered because of the failure of the lessee to develop the land and obtain the oil. Obviously the lessee should forfeit the lease. There is no other way in which justice can be done to the lessor, and the lessee suffers no injury by this course.

We have, then, a situation which demands that a forfeiture take place in order that justice may be done. There is no other way in which the lessor can be compensated and such a forfeiture is usually not harsh. The reasons for the rule—that equity will not enforce a forfeiture or any thing of that nature—having disappeared, then, the rule also should disappear. If the relief which equity should give amounts to a forfeiture then equity should not withhold justice because of an ancient rule, the reasons for which, in these instances, do not exist. Indeed, such an eventuality seems to have been contemplated by Chancellor Kent in the case of *Livingston* v. *Tompkins, supra,* when he said: "The great principle is, that equity 'will not assist in the recovery of a penalty or forfeiture, when the plaintiff may proceed at law to recover it'." But in the oil and gas cases his remedy at law is not adequate and no wrong should be allowed to prevail because there is no remedy. It appears then, as a forfeiture is necessary, and as it is a case with which equity must deal, that equity must grant some relief in the nature of a forfeiture; and as a matter of fact equity does grant such relief. Since in practice the relief sought is almost universally given, the point whether or not such relief amounts to enforcing a forfeiture in equity becomes one more of interest than of importance. But it

[3] 16 CYC. 79; 24 CYC. 1364; 3 STORY, EQUITY JURISPRUDENCE, 14th ed., § 1732, *et seq.*

[4] 24 CYC. 1364.

is a very interesting point to note whether the old iron clad rule against enforcing forfeitures has here been relaxed or not. As we have seen, if this forfeiture can be enforced only in equity then upon equitable principles the old doctrine should be relaxed in these cases.

Let us first consider the nature of oil and gas leases in general. The great majority of these leases contain a condition subsequent to develop the land with a certain amount of diligence or with reasonable diligence, the estate to be forfeited if this is not complied with. Ordinarily all provisions of a lease are construed strictly against a lessor—especially a condition to forfeit the estate. But in the case of oil and gas leases we find the lessor favored instead of the lessee and the law has been stated as follows:[5] "For the reasons stated, the courts are generally inclined to favor the forfeiture * * * and to permit the lessor to enforce such forfeiture by a bill in equity for that purpose * * *" It therefore appears that forfeitures are favored in these cases.

It may be said that the leases on which actions concerning forfeitures are brought are of two general classes:

1. Leases containing an express condition for the breach of which the lease is to be forfeited.

2. Leases containing no express condition for forfeiture but an implied condition (covenant) that the lessee will use reasonable diligence to develop the leased tract.

The actions usually arising under the first class are to quiet title and cancel the deed. The leases of this class are nearly always in the form of an option, the lessee having the option to retain the lease by developing the oil land or by paying a certain stipulated sum by a certain date.[6] If the lessee defaults in payment of the stipulated sum for only a day or so it may, at first glance, seem harsh to enforce the forfeiture. But time is of the essence of an optional contract,[7] and, therefore, the lessee is not entitled to relief since he has obtained all he bargained for. Hence, the objection of harshness disappears, and, as before stated, equity almost invariably grants the relief sought.[8] Whether or not this relief amounts to a forfeiture will be considered later.

Upon the second class of leases—providing forfeiture for the

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[5] 18 R. C. L. 1214.

[6] Dill *v.* Fraze, 39 Ind. App. 532, 77 N. E. 1147.

[7] Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284; Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596; Potts *v.* Whitehead, 20 N. J. Eq. 55; Trogden *v.* Williams, 144 N. C. 10, 56 S. E. 865, 10 L. R. A. (N. S.) 869.

[8] Brown *v.* Vandergrift, 80 Pa. 142; Weiss *v.* Claborn, (Tex. Civ. App.) 219 S. W. 884; Ford *v.* Cochran (Tex. Civ. App.), 223 S. W. 1041; Pendill *v.* Union Mining Co., 64 Mich. 172, 31 N. W. 100; Detlor *v.* Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; Frank Oil Co. *v.* Belleview Gas, etc., Co., 29 Okla. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; Gadbury *v.* Ohio, etc., Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895; but see Kellar *v.* Craig, 126 Fed. 630.

breach of an implied covenant (condition) to develop the land—there is quite a conflict among the decisions. While there is a very respectable amount of authority holding such a breach only gives rise to an action for damages,[9] it is thought the better view is that a forfeiture should be decreed in this case as in the case of the breach of an express condition (or covenant), as the reason for doing so is the same, namely, that damages cannot be estimated. It is also believed that the weight of authority upholds this view.[10] Still another view is that there can be no forfeiture for an implied covenant when the lease contains express ones.[11]

As has been seen, equity will in most cases grant relief *in the nature of a forfeiture,* but does this amount to enforcing a forfeiture? The majority of the opinions seek to find some ground upon which they can place the relief other than forfeiture. When a breach of an express condition is claimed and action is brought to quiet title by removing a cloud from it, the lease is usually considered terminated by its terms and the forfeiture is considered as having taken place before the decree in equity, cancelling the lease and quieting the title, is given. The lease is treated as a void incumbrance, under which the defendant by his claim thereunder clouds the complainant's title. It is said the court is not asked to enforce the forfeiture but to ascertain whether or not it exists, and if so, to remove the cloud—to merely establish the forfeiture as a matter of record.[12]

But the view taken by Justice Van Devanter in *Brewster* v. *Lanyon Zinc Co., supra,* is that it is giving effect to a forfeiture, and this the learned Justice is unable to distinguish from enforcing one. To use his exact words:

> "This constitutes enforcement in the only sense in which that term is applicable to a forfeiture, which is giving effect to it after its incurrence, just as a statute is enforced after its enactment."

In the great majority of instances the court denies that the relief granted amounts to enforcing a forfeiture on the ground that the grant has already terminated according to its terms. If that be true then these cases are correct. For if the grant has terminated there remains no vested right in the lessee and so he has nothing to forfeit; for a forfeiture is the surrender of a right obtained under the main contract. It seems that this is doubtless true in the case of an express condition, for here the instant the estate divests, according to the terms of the lease, is known, and

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[9] 18 R. C. L. 1213, 27 Cyc. 735; Ammons *v.* South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004.

[10] 2 VA. LAW REV. 82; Note, 34 L. R. A. (N. S.) 34; Guffey Petroleum Co. *v.* Oliver (Tex. Civ. App.), 79 S. W. 884; Brewster *v.* Lanyon Zinc Co., 140 Fed. 801.

[11] Harris *v.* Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502.

[12] Pendill *v.* Union Mining Co., *supra;* Harper *v.* Tidholm, 155 Ill. 370, 40 N. E. 575.

the action to declare the forfeiture is brought after this occurs; that is after the condition has taken place and the estate has divested. The lessee has nothing left to forfeit so this cannot be enforcing the forfeiture, it is only establishing it as a matter of record.

In the case of an implied covenant, it has been seen that equity will not always grant relief, but, when it does, is this enforcing forfeiture? For the breach of the implied covenant to develop the land when does the estate divest, at what time does the forfeiture take place? If it can be said that the estate has divested before equity cancels the deed and establishes the forfeiture as a matter of record then we have the same results as above. But, if the estate is not divested until the forfeiture is established by equity, then, it seems that this act itself certainly enforces the forfeiture. The implied covenant referred to is the one to develop the land with reasonable diligence. There is no act done that constitutes a breach of this covenant; the breach is in not doing. There is no certain time when the development must be done. Can we then put our finger on any one point of the duration of the lease and say the lessee was forfeited here, and that, therefore, cancelling the deeds is only establishing the forfeiture as a matter of record? There is no such point. Therefore, it appears that the establishing of the forfeiture as a matter of record is the act which determines the point at which the leasehold estate divests and consequently the act that enforces the forfeiture.

In the recent Virginia case, *Pence* v. *Tidewater Townsite Corp.* (Va.), 103 S. E. 694, the enforcement of a forfeiture in equity was refused. But in this case there was an adequate and complete remedy at law. The decision contains a lengthy discussion on forfeitures and the general rule in Virginia is indicated to be that equity will not enforce a forfeiture unless jurisdiction is obtained on some other grounds, and a forfeiture is necessary to do complete justice to the parties. However, an exceptional rule in the case of oil leases is mentioned, and it is said that the Virginia Court has indicated a tendency to recognize it.[13]

B. D. A.

CONSTITUTIONALITY OF NON-PARTISAN LEAGUE ACTIVITIES.—The activities of the Non-Partisan League, operating chiefly in the Northwest, may be typified by happenings in North Dakota. There the League carried through amendments to the State Constitution, thereby permitting laws to be passed authorizing participation by the State in such industries as the building and renting of homes,[1] the building, owning and operating of State-

[13] Cowan *v.* Radford Iron Co., 83 Va. 547, 3 S. E. 120; Shenandoah Land Co. *v.* Hise, 92 Va. 238, 23 S. E. 303.

[1] Act N. D. (Laws 1919, c. 150).